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No. 84-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,

Appellees,

AND

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,

Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

Brief of Appellants Eugene F. Diamond, M.D. and Jasper F. Williams, M.D.

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QUESTIONS PRESENTED

1. Whether the State of Illinois may require physicians who prescribe or administer abortifacients to inform their patients that they have done so, when the physician is given broad discretion in determining the manner in which that information is conveyed to the patient?

2. Whether a justiciable case or controversy was present in this facial challenge to Sections 6(1) and 6(4) of the Illinois Abortion Law when the relevant statutory provisions had been amended?

3. Whether the court of appeals, if it did not err in addressing the unamended version of Section 6(1), nevertheless erred in disregarding settled precedent on statutory construction and vagueness to strike down a statute that established a standard of care applicable to viable fetuses?

4. Whether the State of Illinois may further its compelling interest in protecting fetal life by requiring a standard of care applicable to any fetus when there is a possibility of his or her sustained survival outside the womb?

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Brief of Appellants
Eugene F. Diamond, M.D.
and Jasper F. Williams, M.D.

Appellants, Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., appeal from the final judgment of the United States Court of Appeals for the Seventh Circuit, dated November 30, 1984, holding that Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law unconstitutionally infringed upon a woman's fundamental right of privacy as secured by the Fourteenth Amendment of the Constitution.*

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* In addition to the parties named in the caption, the following were also parties to the proceedings in the court below: Neil F. Hartigan, Attorney General for the State of Illinois, Richard M. Daley, State's Attorney for the County of Cook, Marvin Rosner, M.D., David Zbaraz, M.D., Martin Motew, M.D., Hector N. Zevallos, M.D., National Health Care Services of Peoria, Inc., Arthur C. Watson, M.D., and Robert C. Steptoe, M.D. All of these parties are appellees in this Court.

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Dorland's Illustrated Medical Dictionary (25th ed. 1974) 11

Haning & Peckham, *Evaluation of Intra-Amniotic Administration of 120 gm of Urea with 5 mg of Prostaglandin F2 alpha for Midtrimester Termination of Pregnancy Between 20 and 24 Weeks' Gestation*, 151 Am.J.Obstet.Gynecol. 92 (1985) 40

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Laufe, *Menstrual Regulation*, in 6 *Gynecology and Obstetrics* 1 (J. Sciarra ed. 1982)..... 14

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit permanently enjoining Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law, which appears in the appendix to the Jurisdictional Statement, App. 1-49, is reported at 749 F.2d 452 (7th Cir. 1984).

The opinion of the District Court for the Northern District of Illinois permanently enjoining sections 2(10), 6(4) and 11(d) of the Illinois Abortion Law, which appears in the Joint Appendix at 77-130, is reported at 579 F.Supp. 464 (N.D. Ill. 1983).

The opinion of the District Court for the Northern District of Illinois issuing a preliminary injunction against certain sections of the Illinois Abortion Law on renewed motion for

preliminary injunction is reported at 579 F.Supp. 377 (N.D. Ill. 1983).

The opinion of the Court of Appeals for the Seventh Circuit granting a preliminary injunction against certain sections of the Illinois Abortion Law is reported at 627 F.2d 772 (7th Cir. 1980).

The opinion of the District Court for the Northern District of Illinois issuing a preliminary injunction against certain sections of the Illinois Abortion Law is not reported, but is printed in the Appendix to Appellees' Motion to Dismiss or Affirm.

JURISDICTION

The final judgment of the Court of Appeals for the Seventh Circuit holding Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law unconstitutional as violative of the Fourteenth Amendment of the Constitution was entered on November 30, 1984. Suit was brought pursuant to 42 U.S.C. § 1983. Notice of appeal to this Court was duly filed in the Court of Appeals for the Seventh Circuit on February 28, 1985. This appeal is being docketed within 90 days of the entry of final judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend XIV, § 1

Ill.Rev.Stat. Ch. 38, ¶ 81-22(10) (1983)

Ill.Rev.Stat. Ch. 38, ¶ 81-26(1) (1983)

Ill.Rev.Stat. Ch. 38, ¶ 81-26(1) (1984 Supp.)

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Ill.Rev.Stat. Ch. 38, ¶ 81-26(4) (1984 Supp.)

Ill.Rev.Stat. Ch. 38, ¶ 81-31(d) (1983)

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Ill.Rev.Stat. Ch. 38, ¶ 81-26(5) (1983)

The text of these provisions is set forth in the appendix to this brief.

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Appeals for the Seventh Circuit granting a permanent injunction against Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law of 1975, as amended. Jurisdictional Statement (J.S.) at App. 1.

On October 30, 1979, the appellees filed a complaint in the United States District for the Northern District of Illinois for declaratory and injunctive relief against enforcement of S.B. 47, a bill amending the Illinois Abortion Law of 1975, that had been passed that same day by the General Assembly of Illinois. Suit was filed against the Attorney General of Illinois and the State's Attorney for the County of Cook, as representative for the class of State's Attorneys in Illinois. On November 13, 1979, then-District Judge Flaum granted the motion of appellants Eugene F. Diamond, M.D., and Jasper F. Williams, Sr. M.D., to intervene as defendants in this matter.

On November 16, 1979, Judge Flaum entered an order granting in part and denying in part plaintiffs' motion for a preliminary injunction against the enforcement of S.B. 47 in its entirety. Among the provisions enjoined by the court were Sec. 6(1) and Sec. 6(4). These provisions were enjoined because they incorporated a definition of viability that was held to be invalid by the court. Among the provisions upheld were Sec. 2(10), which is a definition of abortifacient, and Sec. 11(d), which requires physicians who prescribe abortifacients to inform their patients that they are doing so. The court of appeals reversed the judgment with respect to

Secs. 2(10) and 11(d), and entered a preliminary injunction against those sections. *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980) (*Charles I*).

Appellees' Renewed Motion for Preliminary Injunction was granted in part and denied in part by District Judge Kocoras on July 14, 1983. *Charles v. Carey*, 579 F.Supp. 377 (N.D.Ill. 1983) (*Charles II*). None of the sections now on appeal was the subject of that ruling. Illinois House Bill 666, which amended the definition of viability that had been enjoined by Judge Flaum and certain language of § 6(4), became law on September 17, 1983, after briefing had been completed on cross-motions for summary judgment. Judge Kocoras' decision of October 14, 1983, as amended on November 2, 1983, issued a permanent injunction against §§ 2(10), 11(d) and 6(4), but upheld § 6(1) and dissolved the preliminary injunction that had been entered against it. *Charles v. Carey*, 579 F.Supp. 464 (N.D.Ill. 1983) (*Charles III*) Joint Appendix (J.A.) at 77.

On December 2, 1983, defendants Daley and Hartigan and appellants timely filed separate motions of appeal from those aspects of the final judgment permanently enjoining Secs. 2(10), 11(d) and 6(4). On December 16, 1983, appellees cross-appealed from the District Court's refusal to issue a permanent injunction against Sec. 6(1).

On June 30, 1984, after the issues were fully briefed in the court of appeals but before oral argument, the General Assembly enacted H.B. 1399. That bill amended several sections of the Illinois Abortion Law, including §§ 6(1) and 6(4). Appellants notified the court of appeals and appellees of the amendments prior to oral argument and, at oral argument, the court directed the parties to file supplemental briefs on the issue of mootness.

On November 30, 1984, the court of appeals affirmed the entry of a permanent injunction against Secs. 2(10) and 11(d). The court also ruled that the amendments to Secs. 6(1) and 6(4) did not moot those issues and proceeded to rule upon the constitutionality of those provisions in their unamended versions. The court reversed the denial of an injunction as to Sec. 6(1) and affirmed the injunction against Sec. 6(4). *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984) (*Charles IV*). Appellants filed their notice of appeal with the court of appeals and their Jurisdictional Statement in this Court on February 28, 1985. This Court noted probable jurisdiction on May 20, 1985.

SUMMARY OF THE ARGUMENT

The State of Illinois has indicated a desire to regulate abortion in a manner protective of both maternal health and fetal life. While Illinois seeks to regulate abortion to the greatest extent permissible, it has stated its intent to do so in a manner consistent with *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. Ill.Rev.Stat. ch. 38, ¶ 81-21 (1983). The provisions on appeal were enacted to protect maternal health and fetal life and they do so in a manner that is consistent with the prior decisions of this Court.

Sections 2(10) and 11(d) protect the right of women to choose not to use abortifacients by requiring physicians who prescribe them to inform their patients that they are doing so. The precise manner in which the doctor discloses this information is left entirely to his discretion.

The Seventh Circuit's decision striking down §§ 2(10) and 11(d) is in direct conflict with the decisions of this Court and acts impermissibly to restrain the State of Illinois from enacting legitimate health regulations pursuant to its police powers.

This Court has held that women have a fundamental right to choose not to have an abortion. *Maher v. Roe*, 432 U.S. 464 (1977). It has also upheld the right of States to protect a woman's choice by requiring that her consent be obtained

prior to the performance of an abortion upon her. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). Since it is impossible for a woman to choose not to use a drug or device which causes abortion if she is unaware that one is being offered to her, she must be informed when such drugs and devices are administered to her. Many women would use contraceptive methods of birth control but would never use abortifacients because they believe that the fetus should be valued from the time of fertilization forward. Failure to inform those women that an abortifacient is being administered to them would violate their freedom of choice.

Furthermore, it is clear that some physicians, including appellees, would prefer not to inform women of the abortifacient effect of drugs and devices that they prescribe and administer. Also, medical journals and the popular press often blur the distinction between abortifacients and contraceptives by referring to both as "contraceptives." Reference to drugs and devices which induce abortion at early stages of pregnancy as "contraceptives" is inaccurate and misleading since contraception is the artificial prevention of the fertilization of the human ovum. The State may, pursuant to its police powers, regulate its licensed professionals in a manner that prevents the dissemination of such deceptive and misleading information. *Zauderer v. Office of Disciplinary Counsel,* 105 S.Ct. 2265 (1985).

The court of appeals erred in construing §§ 2(10) and 11(d) to require that a physician inform his patient that "abortifacients cause the death of unborn children." Those provisions do not require any such thing. Rather, they leave broad discretion to the physician in his choice of words. Thus, they do not foist a theory of life upon the physician and his patient. Moreover, these provisions do not burden any fundamental right. The only possible burden that these sections might impose would be to make women who would like to use abortifacients, but would prefer to do so in ignorance, realize what they are doing. Women do not have

a fundamental right to obtain abortions in ignorance. The State need not abandon its compelling interest in protecting women from unwittingly submitting to abortions simply because some women might wish to use abortifacients in ignorance. The fundamental right to choose not to use an abortifacient outweighs any right to use abortifacients in ignorance.

Sections 6(1) and 6(4) were amended prior to the court of appeals' decisions. The court of appeals should not have reviewed those sections as they stood prior to amendment because there was no reasonable likelihood that they would be reenacted and no continuing adverse effect of the alleged violation exists. Also, federal courts should review lower court holdings in light of presently existing law, not the law that was in effect when the judgment below was rendered. *Fusari v. Steinberg,* 419 U.S. 379 (1975). A live case or controversy existed with respect to those sections, as amended, since the legal issues remained the same and no factual issues were in dispute. The court of appeals should have reviewed the amended provisions and so should this Court.

Whether the amended or unamended version of § 6(1) is reviewed, it is constitutional. The State has a compelling interest in protecting the viable fetus. *Roe*, 410 U.S. at 164. The State may regulate abortions performed on viable fetuses by requiring that a standard of care be used to protect the life of the fetus when no increased risk to the mother would be caused. Neither the amended nor unamended version is vague on its face. The good faith viability determination of the physician performing the abortion is final under both versions. And, the conduct required of the physician is not difficult to understand—physicians routinely apply the standard of care applicable to their specialty. Since these provisions are not vague, are supported by a compelling interest in protecting fetal life, and have no impermissible chilling effect on doctors or their patients, they are constitutional.

Section 6(4) requires that the method of abortion most likely to preserve fetal life be used when, in the physician's judgment, there is a possibility of fetal survival. It does not apply when the fetal survival method of abortion would increase risk to the mother. Nor does it prohibit any abortion. In short, it does not restrict the woman's ability to obtain an abortion in any way. She remains free to consult with her doctor and to legally terminate her pregnancy for whatever reason they decide upon.

Since a woman does not have a right to terminate her pregnancy in a manner that ensures fetal death, the fact that this provision prevents her from doing that does not violate her rights. In addition, the State has a compelling or, at least, very substantial interest in protecting fetal life when there is a possibility that the fetus can survive. Given the importance of the State's interest and the lack of burden imposed on the woman by § 6(4), it is constitutional.

ARGUMENT

I. THE STATE OF ILLINOIS MAY REQUIRE PHYSICIANS WHO PRESCRIBE OR ADMINISTER ABORTIFACIENTS TO INFORM THEIR PATIENTS THAT THEY HAVE DONE SO, WHEN THE PHYSICIAN IS GIVEN BROAD DISCRETION IN DETERMINING THE MANNER IN WHICH THAT INFORMATION IS CONVEYED TO THE PATIENT.

The State of Illinois has determined that it is necessary to protect the right of its female citizens to choose not to use abortifacients. To this end, the State enacted § 11(d) of the Illinois Abortion Law.[1] That section requires physicians

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[1] Section 11(d) states:

> Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument,

(footnote continued on next page)

who administer or prescribe abortifacients to inform their patients that they are doing so. Nothing in § 11(d) requires the physician to describe an abortifacient in any particular manner.[2] He may use whatever language he chooses in describing it. Thus, the State leaves broad discretion to the physician to determine the manner in which the required information will be disclosed to his patient.

The decision of the Court of Appeals for the Seventh Circuit striking down §§ 11(d) and 2(10) is in direct conflict with the decisions of this Court and acts impermissibly to restrain the State of Illinois from enacting legitimate health regulations pursuant to its police powers.

A. The State May Require That Abortifacients Are Administered to Women Only with Their Consent.

1. The Decisions of This Court Support the State's Right to Require that Consent Be Obtained Prior to the Use of Abortifacients.

Women have a right to choose not to have an abortion that is at least as fundamental as the right to choose abortion. *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977). It is utterly impossible for a women to choose not to submit to an abortion

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(footnote continued from preceding page)

> medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for which it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

Ill.Rev.Stat. ch. 38, ¶ 81-31, § 11(d) (1983). Section 11(d) was renumbered as § 11(3) by House Bill 1399. Ill.Rev.Stat. ch. 38, ¶ 81-31(3) (1984 Supp.).

[2]Section 2(10) defines "abortifacient" so that doctors will know under what circumstances § 11(d) applies. Section 11(d) does not, however, require physicians to use the term "abortifacient" or to describe an abortifacient by using the language set forth in § 2(10).

if she is unaware that an abortion is being performed upon her or will occur to her. The State has a compelling interest in requiring that women be told when an abortion is about to be performed upon them so that their consent to that procedure may be obtained.

This Court's decisions in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), have upheld the right of States to protect the woman's fundamental right of choice by requiring that her consent be obtained prior to the performance of an abortion upon her. In *Danforth*, the Court held that it is permissible for a State to require a woman's prior written consent to an abortion. In so doing, the Court stated:

> [I]t is desirable and imperative that [the abortion decision] be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State.

428 U.S. at 67. While there are limitations on the amount of information that may be required to be given, it is clearly permissible for the State to require that a woman be informed "as to just what would be done and as to its consequences." *Id.* at 67 n.8. Consistent with *Danforth*, § 11(d) requires that a woman be told just what is being done (a drug or device which is known to cause abortion is being prescribed for her) and what the consequences are (an abortion might result if she is pregnant).

More recently, in *Akron*, this Court stated: "Consistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion." *Akron*, 462 U.S. at 445. Thus, a provision that merely describes in general terms the information to be disclosed is permissible because it leaves the "precise nature and amount of this disclosure to the physician's discretion and 'medical judgment.'" *Id.* at 447.

The principles set forth in *Maher*, *Danforth* and *Akron* govern this case with equal force. Abortifacients, by definition,[3] are drugs and devices which cause abortions when used by pregnant women. Since abortifacients cause abortions, the State's interest in enacting § 11(d) and thereby ensuring that abortifacients are administered only with the woman's informed consent is as important as the State's interest was in *Danforth*. In both instances, the State is ensuring that a woman's consent to an abortion be secured.[4]

Affidavits submitted in the district court by appellants demonstrate that many women believe that the life of the fetus should be valued from the time of fertilization forward. *See* Affidavits of Dianna Shark, Debra Evans, and Mary Gaspar. Joint Appendix (J.A.) at 57-62. These women would use contraceptive methods of birth control but would never knowingly choose to use an abortifacient method of birth control because that would cause the death of an organism already in existence. Plainly, failure to inform a woman who is opposed to abortion that a drug or device being administered to her will cause an abortion would be an egregious violation of her freedom of choice.

On its face, § 11(d) requires no more than is permissible under *Danforth* and *Akron*. It describes in general terms that the doctor must inform his patient that he is prescribing an abortifacient for her if he knows he is doing this. The

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[3] According to Dorland's medical dictionary, an "abortifacient" is "an agent which causes abortion." *Dorland's Illustrated Medical Dictionary* 4 (25th ed. 1974).

[4] The State's interest in enacting § 11(d) may be even more important because there is a greater need for information when a woman is seeking "birth control" rather than an abortion. In *Danforth*, the informed consent provision applied to women who presumably knew they were pregnant and were seeking an abortion. Here, however, § 11(d) applies to women who are seeking birth control and who may never even suspect that an agent which causes an abortion is being prescribed for them.

precise manner in which the doctor discloses this information is left entirely to his discretion. No specific language is required. A physician is free to inform the patient that a drug or device is being prescribed or administered that "prevents birth after fertilization has taken place," that "causes the premature expulsion from the uterus of the products of conception," that "causes an abortion," that "causes fetal death," or that "kills unborn children." The law simply does not penalize the physician for his choice of words. It does, however, penalize him for his intentional failure to inform the woman of the abortifacient effect of the drug or device that is being administered so that she may choose not to use it.

In summary, § 11(d) furthers the State's compelling interest in protecting the fundamental right of women to choose not to use abortifacients. It requires only that women be informed about the effects of drugs and devices that are being prescribed for them. And, it allows the physician the necessary flexibility that *Akron* requires. Therefore, § 11(d) is constitutional under this Court's prior holdings.

2. Under Its Broad Police Powers, a State May Regulate the Medical Profession and Require the Disclosure of Accurate Information That Is necessary to Obtain Consent to the Use of Abortifacients.

The Tenth Amendment to the Constitution reserves to the States broad police powers to protect the health and welfare of their citizens. It is beyond dispute that these police powers extend to regulation of the medical profession. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). *See also Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("the State has broad police powers in regulating the administration of drugs by the health profession").

Through its licensing procedures, the State empowers physicians to give professional advice to women on the choice of birth control they might use. Having placed physicians in this position of responsibility, the State has a right to ensure that they disclose accurate information necessary for a

woman to choose between contraceptive and abortifacient methods of birth control.

Physicians who administer abortifacient methods of birth control do not have a right to do so without the consent of their patient. As with other drugs or devices that a physician may prescribe, the patient has a right to know what their effect will be and to reject their use. Since it is impossible for a woman to give consent to the use of an abortifacient if she does not know that an abortifacient is being prescribed or administered, it is essential that she at least be informed of that fact.

Many forms of "birth control" are practiced in this country today. Some prevent conception and are contraceptives; others prevent birth after conception has taken place and are abortifacients. Yet many still think of "birth control" only as a method of preventing conception since that is its customary usage.[5] They are not aware that both abortifacients and contraceptives are now sometimes considered methods of "birth control." Nor are they aware that some physicians have begun blurring the distinction between abortifacients and contraceptives by referring to both as "contraceptives." Recent articles in medical journals[6] and the popular press show that abortifacients are sometimes called "contraceptives." For example, one article states that two pharmaceutical companies "are both testing a new class of *contraceptives*

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[5] *Webster's New Twentieth Century Dictionary Unabridged* (2d ed. 1983), for example, defines "birth control" as follows: "the act of regulation of childbearing, esp. by contraceptives." *Id.* at 186. Also, "contraception" is "often called 'birth control.'" *Id.* at 396.

[6] *See, e.g.*, Johnson, *Contraception--The Morning After*, 16 Family Planning Perspectives 266 (1984) (referring to drug which prevents implantation of already fertilized ovum as "contraceptive"); *Postcoital Contraception,* 1:8329 Lancet 855 (1983) (suggesting use of term "contraceptive" to describe drug which acts between fertilization and implantation of blastocyst).

that promise to reduce drastically the number of clinic abortions performed each year." Rhein et al., *A Pill that 'Might Defuse the Abortion Issue,'* Bus. Wk., Apr. 1, 1985, at 85 (emphasis added). The next sentence, however, states that "[t]he drugs *induce abortion*, [and] can halt pregnancies in very early stages with minimal side effects." *Id.* (emphasis added).

Some doctors also perform "menstrual extraction" on their patients without informing them of the abortifacient effect such procedures will have if the woman is already pregnant.[7] Dr. Warren Hern, who regularly performs abortions, has pointed out that menstrual extraction is a "euphemism for early abortion," and that the "[u]se of menstrual extraction to deny the emotional implications of pregnancy and the decision to abort is a practice that must be deplored." Hern, *First Trimester Abortion: Complications and Their Management*, in 6 *Gynecology and Obstetrics* 1, 2 (J. Sciarra ed. 1982).

Reference to drugs and devices which induce abortion at early stages of pregnancy as contraceptives is simply inaccurate and misleading. "Contraception" is the "artificial prevention of the fertilization of the human ovum." *Webster's New Twentieth Century Dictionary Unabridged* 396 (2d ed. 1983). Abortifacients do not prevent fertilization and are not contraceptives since they operate after fertilization has taken place. Given the common meaning of contraception, a woman would naturally believe that the "contraceptive" she is receiving prevents fertilization. She would have no reason to suspect that the drug or device was not a contraceptive; that instead, it was something that causes an abortion.

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[7] The deceptive character of such practices is highlighted by the fact that doctors have stated that the use of the term "menstrual regulation" is preferable "in those countries where pregnancy termination is illegal." Laufe, *Menstrual Regulation*, in 6 *Gynecology and Obstetrics* 1 (J. Sciarra ed. 1982). Laufe also suggests that this terminology allows women "to avoid confronting the issue of abortion." *Id.* at 6.

The State is entitled to require disclosure of information that is necessary to prevent deception. While "truthful [information] related to [ ] lawful activities" is entitled to First Amendment protection, "[f]alse, deceptive, or misleading [information] remains subject to restraint." *In re R.M.J.*, 455 U.S. 191, 200 (1982). This is especially true in the case of information disseminated by professionals—in this case, doctors. Such information "poses special risks of deception" since the patient's comparative lack of knowledge makes it likely that she will accept the doctor's description as entirely accurate. *Id.*[8] Because of the great potential for confusion and deception associated with information disseminated by professionals, and the "limited ability of the professions to police themselves," the State has a legitimate interest in regulating the content of their speech in a manner which prevents such abuses. *Id.* at 202. That interest becomes compelling when such deception deprives a woman of her fundamental right to choose not to have an abortion performed upon her.

In *Zauderer v. Office of Disciplinary Council*, 105 S.Ct. 2265 (1985), this Court reaffirmed the above principles, holding that the right of a professional to refrain from "divulg[ing] accurate information regarding his services is not [ ] a fundamental right." *Id.* at 2282 n.14. The Court also stated that the interest in failing to provide factual information is minimal, and it is adequately protected if the disclosure requirements are reasonably related to the State's interest in preventing deception. *Id.* at 2282. Thus, the State has the power to require its licensed professionals to disclose accurate information concerning their services.

Just as in *Zauderer*, the possibility for deception and resulting harm is self-evident in this case. First, it is clear that a number of doctors, including appellees, would prefer not to inform women of the abortifacient effect of drugs and

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[8] Minors, who account for approximately one-third of the abortions performed each year, are especially susceptible in this regard.

devices that they prescribe. Second, it is essential that a woman be given such information in order for her to be able to choose not to use abortifacients. Finally, the failure to inform a woman of the abortifacient effect of a drug deprives her of her fundamental right to continue her pregnancy and may cause her emotional distress when she later learns what has been done to her.

In summary, § 11(d) requires only that accurate information, of the physician's own choosing, be disclosed. It prevents misleading information from being disseminated. It also protects women from unwittingly violating their deepest moral beliefs and thereby incurring psychological harm. Thus, it is a permissible exercise of the State's police power.

B. The Seventh Circuit's Decision Is Contrary to the Decisions of This Court and Infringes Upon the State's Power to Regulate the Medical Profession in a Manner Consistent with the Health and Welfare of Its Citizens.

In spite of the State's compelling interest in protecting the fundamental right of its female citizens to choose between contraceptive and abortifacient methods of birth control, and the fact that § 11(d) requires no more than what is permissible under *Danforth* and *Akron*, the court of appeals struck it down.[9] In so doing, the court failed to give that section principled constitutional analysis. The court's opinion is so cursory that it fails even to articulate the rights that were

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[9]Section 2(10), which is only definitional, was also struck by the court of appeals. However, the court did not give a specific reason for striking this definition. Section 2(10) states:

> "Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

Ill.Rev.Stat. ch. 38, ¶ 81-22(10) (1983).

supposedly infringed upon. Nor does it indicate the manner in which this provision supposedly burdens any such rights.

The court apparently struck §§ 2(10) and 11(d) for several reasons. First, they impermissibly impose the State's theory of when life begins upon the physician and his patient. J.S. at App. 40-41. Second, they intrude upon the medical discretion of the attending physician. J.S. at App. 41. Third, they act inequitably to protect women who are opposed to the use of abortifacients by requiring that women who prefer to use abortifacients be told that they are doing so. J.S. at App. 42. Finally, they infringe upon the woman's right of private decision-making in matters relevant to contraception. J.S. at App. 43. Each of these reasons is discussed below.

1. Sections 2(10) and 11(d) Do Not Make the Physician the Mouthpiece for the State's Theory of Life.

In striking §§ 2(10) and 11(d), the court held that they unconstitutionally "force[d] the physician to act as the mouthpiece for the State's theory of life." J.S. at App. 40. Citing *Akron* for the proposition that the State may not "foist[ ] upon the pregnant woman its view that life begins at conception," the Seventh Circuit reasoned that "sections 2(10) and 11(d) constitute such an attempt by the State of Illinois because the terms incorporate a definition of 'fetus' in which the State classifies a fetus as a human being from fertilization until death [*sic*]." *Id.* at 39-40.[10]

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[10] "Fetus" was formerly defined as a human being from fertilization until *birth*. Ill.Rev.Stat. ch. 38, ¶ 81-22(9) (1983). That definition of "fetus" was amended by House Bill 1399 prior to the court's ruling to mean "an individual organism of the species homo sapiens from fertilization to live birth." Ill.Rev.Stat. ch. 38, ¶ 81-22(6) (1984 Supp.). Thus, under the present law, the definition of fetus does not use the term "human being" or "human." Since the court seemingly did not base its decision on the presence or absence of the term "human" in the definition of fetus, that change is not relevant.

The language of *Akron* on which the court relied, however, is inapposite. That statement was made in the context of an ordinance that specifically required a doctor to tell a woman that "the unborn child is a human life from the moment of conception." *Akron*, 462 U.S. at 423 n.5. Nothing in either § 2(10), which is merely definitional, or § 11(d), the regulatory provision, requires the doctor to state any such thing. Indeed, in the court's own words, the plain language of § 11(d) "requires physicians who prescribe or administer abortifacients to inform their patients that they have done so." J.S. at App. 37. However, the court went beyond that language and proceeded to construe § 11(d) to require that physicians also inform their patients that "abortifacients cause the death of unborn children." J.S. at App. 42.

Certainly, had the General Assembly wished to foist a theory of life upon women and force physicians to act as a mouthpiece for that theory, it could have drafted § 11(d) to specifically require that the physician tell his patient that he is administering an abortifacient and that abortifacients "cause the death of unborn children." The General Assembly, however, did not do this. It merely required physicians to inform their patients when they are administering abortifacients to them. Section 11(d) does not restrict the physician's choice of words, nor does it mandate the use of any specific words. See this Brief at 12.

"Where fairly possible, courts should construe a statute to avoid the danger of unconstitutionality." *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 493 (1983). The Seventh Circuit's unwarranted construction of this provision clearly did not attempt to avoid the danger of unconstitutionality. Rather, the court read language, not enacted by the legislature, into § 11(d) for the express purpose of striking that provision down. *Ashcroft* teaches that such actions are entirely inappropriate.[11]

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[11] In addition, the court's construction was contrary to the construction given by appellants in both the district court and court of appeals. In those courts, appellants argued that to

(footnote continued on next page)

Since neither § 11(d) nor § 2(10) requires a physician to espouse a theory of life, it cannot be said that they foist such a theory of life on the physician's patient. Therefore, it was error for the court of appeals to strike these provisions as impermissibly foisting a theory of life upon the physician and his patient.

2. Physicians Do Not Have a Right, at Their Discretion, to Administer Abortifacients to Women Without Their Knowledge and Consent.

The second reason given by the court of appeals for striking §§ 2(10) and 11(d) was that they "intrude upon the medical discretion of the attending physician." J.S. at App. 41. Since the court does not delimit the right of doctors to exercise "medical discretion," or explain how these provisions infringe upon it, it may be assumed that the court felt that doctors somehow have an untrammelled right to exercise their discretion and that any requirement which relieves them of a portion of such discretion infringes upon that right.

It is clear, however, that physicians have no such independent right. They are not free to administer abortifacients without the knowledge and consent of their patients any more than they are free to perform an abortion upon a woman without her consent and against her will. *Danforth*, 428 U.S. at 67. *See* Part I A of this Brief.

(footnote continued from preceding page)

comply with § 11(d), doctors need only inform their patients that they are administering abortifacients and nothing more. State's Attorney Daley and Attorney General Hartigan are responsible for enforcement of these provisions. In both the district court and the court of appeals, they adopted the briefs of appellants as their own. *See* J.A. at 73-76, 135-138. This is a limiting construction by the State which the court of appeals was not free to ignore. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982).

Doctors have, on occasion, claimed that *Doe v. Bolton*, 410 U.S. 179 (1973), recognized a fundamental right "to practice medicine free of unwarranted state interference." *Whalen*, 429 U.S. at 604. However, such claims have been flatly rejected by the Court. Speaking for an unanimous Court, Justice Stevens stated:

> The constitutional right vindicated in *Doe* was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion provisions were invalid because *they encumbered the woman's exercise of that constitutionally protected right* by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.

Id. (emphasis added). *See also Harris v. McRae*, 448 U.S. 297, 318 n.21 (1980).

Accordingly, in order for §§ 2(10) and 11(d) to be unconstitutional, they must place an obstacle in the path of the physician and that obstacle must, in turn, encumber the woman's right "to decide whether or not to bear a child." *Whalen*, 429 U.S. at 604. The only possible "obstacle" that § 11(d) imposes is that it requires a physician to inform his patient when he is giving her an abortifacient. However, the court of appeals does not explain how this "obstacle" can be said to "encumber" the woman's right to choose abortion. It never even addresses the question. Had it done so, it would have been compelled to find that these sections do not encumber the woman's right at all since it is impossible for a woman to choose an abortion when she does not know that one is being offered to her.

It is not surprising that no woman is before the Court challenging the operation of § 11(d). Only appellees, physicians and abortion clinics, are challenging it. These appellees claim to represent the interests of their patients. Yet, their claim must reduce to an argument that their female patients have a right to obtain abortions by using abortifacients in ignorance and that appellees have a derivative right to keep them in ignorance. This Court has never enunciated such a right and none exists. Thus, these sections cannot be held unconstitutional on this basis.

3. It Is Not Inequitable to Protect The Right of Women Who Are Opposed to the Use of Abortifacients By Requiring That All Women Be Informed When Abortifacients Are Prescribed for or Administered to Them.

The court of appeals suggested that §§ 2(10) and 11(d) are unconstitutional because it is inequitable to require that women wishing to use abortifacients be told that they are using them. J.S. at App. 42. The court fails to specify what supposed burden is imposed upon these women and no such burden is set forth in the record. A woman who is not opposed to abortion would not be burdened by being informed that an abortifacient has been prescribed for her. If, indeed, distress is caused to a woman from knowledge that an abortifacient has been prescribed for her, then it must be because she has reservations about abortion.

Sections 2(10) and 11(d) are designed to protect the fundamental rights of women who are opposed to abortion by allowing them to *choose* intelligently to refrain from using abortifacients. Thus, these provisions protect those women most likely to experience harm: those who unknowingly would accept abortifacients and later learn that what they thought was a contraceptive or other medication was, in fact, an article violating their most deeply held beliefs.

The only possible burden imposed by § 11(d) would be to women who would like to use abortifacients but would prefer to do so in ignorance. Such an interest in using abortifacients in ignorance is neither fundamental nor sufficient to strike this statute. The fundamental right of women who are opposed to abortion to choose not to use abortifacients must be given greater protection. The inequity of the situation is not, as the court below suggested, in protecting the fundamental rights of women opposed to abortion. Rather, the inequity lies in the court's holding. That holding requires the State to subordinate its compelling interest in protecting the fundamental right of choice to the right of some women to remain ignorant. The court of appeals should not have invalidated §§ 2(10) and 11(d) in order to protect such a speculative and spurious interest.

4. Sections 2(10) and 11(d) Do Not Infringe Upon the Woman's Right of Private Decision-Making in Matters Relevant to Contraception.

The Seventh Circuit's final reason for striking these sections was that they infringed upon the woman's right to use contraception. J.S. at App. 43. This statement, alone, demonstrates the failure of the court to grasp the fundamental difference between contraceptives and abortifacients. Section 11(d) applies only when an *abortifacient* (not a contraceptive) is being prescribed.

The only conceivable way that this section could infringe upon a woman's right to use contraceptives would be if the State were to classify certain contraceptives as abortifacients in an attempt to dissuade women from using those contraceptives. This the State has not done. Contraception refers to the "artificial prevention of the fertilization of the human ovum." *Webster's New Twentieth Century Dictionary Unabridged* 396 (2d ed. 1983). In contrast, abortifacients, because they cause abortions, do not prevent fertilization. Rather, they prevent birth after fertilization has taken place.

Section 2(10) does not define abortifacient in a manner that would include methods of contraception. It applies only to drugs that prevent birth after fertilization has taken place. Only those drugs which the physician knows are abortifacients and are *in fact* abortifacients are covered by § 11(d). Therefore, it would be impossible for this section to infringe upon a woman's right to use contraceptives. Since these sections do not even apply to contraception, they cannot be held unconstitutional on this last ground.

II. A JUSTICIABLE CASE OR CONTROVERSY DID NOT EXIST WITH RESPECT TO UNAMENDED SECTIONS 6(1) AND 6(4) IN THE COURT OF APPEALS

On June 30, 1984, after the issues were fully briefed in the court of appeals but before oral argument, the General Assembly enacted H.B. 1399. That bill amended a number of provisions of the Illinois Abortion Law, including §§ 6(1) and 6(4). *See* Appendix to this Brief (App.) at 5a-7a.

A. A Live Case or Controversy Remains With Respect to Amended §§ 6(1) and 6(4).

An amendment to a challenged law during the pendency of litigation raises questions of mootness. *Schall v. Martin*, 104 S.Ct. 2403, 2405 n.2 (1984). "In the federal system an appellate court determines mootness as of the time it was filed." *Allee v. Medrano*, 416 U.S. 802, 818 n.12 (1974). Consequently, it is well-settled that federal appellate courts "must review [lower court holdings] in light of presently existing [ ] law, not the law in effect at the time that judgment was rendered." *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975).

A change in law that so substantially alters the law as to eliminate the questions under review moots those questions.[12] In *Allee*, an amendment to a statute which was challenged on vagueness grounds substantially altered the vagueness issue

[12] The proper course of action for the reviewing court in such circumstances is to vacate the lower court judgment with directions to dismiss the complaint as moot. *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950).

since the amended language was narrower than its predecessor. 416 U.S. at 818. In such a case, "if there are no pending prosecutions under the old statutes, the portion of the [lower court's] judgment relating to them [is] moot." *Id.*

A change in law that does not moot all of the issues on appeal requires the reviewing court to resolve those questions which are not moot. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. 450 (1864). However, should the reviewing court find that additional facts are necessary in order to review the amended law, it may vacate the lower court's judgment and "remand for reconsideration in light of the intervening changes in [the] law." *Fusari*, 419 U.S. at 390.

The Court's decisions in *Brockington v. Rhodes*, 396 U.S. 41 (1969), and *Hall v. Beals*, 396 U.S. 45 (1969), illustrate the governing principles for determining whether a live case or controversy exists with respect to an amended law. In *Brockington*, an Ohio statute that required the signatures of 7% of the voters before a name could be placed on the election ballot was challenged by a prospective candidate who had obtained only 1% of the voters' signatures. While the appeal was pending before the Court, the relevant statute was amended, reducing the signature requirement to 4%. In response to a suggestion of mootness, the Court stated:

> We do not think the recent statutory amendment has rendered this case moot. For the appellant has consistently urged the unconstitutionality of any percentage requirement in excess of the 1% that Ohio imposed prior to 1952, and he obtained the signatures of only about 1% of the voters in his district. He thus could not have won a place on the ballot even under the statute as currently written.

Brockington, 396 U.S. at 43.

In contrast, in *Hall v. Beals*, a Colorado law requiring six months residency prior to voting in a presidential election

was challenged by a class of persons who had resided in Colorado for only five months and wished to vote in the election. After probable jurisdiction had been noted, the law was amended to require only two months in-state residency.

Reviewing "the judgment below in light of the Colorado statute as it now stands, not as it once did," *Hall*, 396 U.S. at 48 (citations omitted), the Court held that the case was moot since "under the statute as currently written, the appellants could have voted in the 1968 presidential election." *Id.* Even though appellants also opposed the two month residency requirement, the court stated: "[A]ppellants' opposition to residency requirements in general cannot alter the fact that so far as they are concerned nothing in the Colorado legislative scheme as now written adversely affects either their present interests, or their interests at the time this litigation was commenced." *Id.* at 48-49.

In applying the above principles to amended § 6(1), it is not entirely clear whether a case or controversy continues to exist. Whether appellees' challenge of § 6(1) has been mooted entirely depends upon whether appellees, in their challenge of prior § 6(1), questioned the State's ability to regulate abortion on behalf of fetal life after viability, or whether they based their challenge solely on vagueness grounds. If the former, a live case or controversy remains with respect to amended § 6(1) because appellants clearly argue that the State has a right to regulate in that manner.

Application of *Brockington* and *Hall* to § 6(4) indicates that a live case or controversy remains with respect to amended § 6(4). As in *Brockington*, appellees continue to urge the unconstitutionality of the amended provision and appellants continue to claim that it is constitutional. Appellees allege that HB 1399 only "superficially" amended § 6(4) and that the new language "retains the very standard held unconstitutional by both the Court of Appeals and the District

Court." [13] Motion to Dismiss or Affirm (Motion) at 8. In short, appellees maintain that the amended version of § 6(4) contains the same constitutional deficiencies as its predecessor.[14]

The existence of a live case or controversy with respect to the amended law does not, however, mean that the court of appeals was at liberty to review §§ 6(1) and 6(4) as they stood unamended. If the court intended to render an opinion affecting the rights of the litigants, it ought to have decided the constitutionality of those sections as they stood amended.

This Court has jurisdiction to review the amended provisions and should do so. They present questions of law, not fact, and there is no need to remand so that the record can be expanded. Neither justice nor judicial economy would be served by remanding this case. The State of Illinois has already had its legitimate attempts to regulate in this area frustrated by injunction since 1979. A remand would only result in further delay with the same legal issues coming before this Court at a later date.

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[13] Apparently, appellees do not understand the term "standard of care" used in old § 6(4) to be different from the term "method of abortion" used in the amended version. It is assumed that they base their statements on the fact that those terms were equated by the court in *Wynn v. Scott*, 449 F.Supp. 1302 (N.D.Ill. 1978), *aff'd sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979).

[14] In their Motion to Dismiss or Affirm appellees state that:

> [the] new section 6(4) continues to impose criminal liability on physicians who fail to act on behalf of a pre-viable fetus with only a "possibility of survival" outside the womb. Section 6(4) thus continues to contravene the prior holdings of this Court barring regulation of previability abortions unless that regulation is narrowly structured to protect maternal health.

Motion at 10-11.

B. The Court of Appeals Erred in Reviewing Unamended §§ 6(1) and 6(4).

In spite of the amendments to these provisions and the mootness holdings of this Court, the court of appeals held that the old sections were not moot. In so holding, it applied the "voluntary abandonment" exception to mootness.

While it is true that voluntary cessation of allegedly illegal conduct will not, standing alone, dispel a controversy, it will have this effect if "(1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citation omitted).

There is no reasonable expectation that the alleged violation will recur because it is unreasonable to suggest that the General Assembly would ever re-enact the old provisions which it recently amended. The amendment of these sections did not constitute an abandonment by the State of any regulation of abortion. Rather, it consisted entirely of "fine-tuning" which left fully intact the substantive protection of the life and health of the fetus which were afforded by unamended §§ 6(1) and 6(4). Under both the old sections and the new, the General Assembly sought to maximize the chances of fetal survival after abortion. It did not simply repeal certain language in anticipation of litigation in an attempt to moot a consitutional challenge, and then re-enact the same language at a later date. *Cf. City of Mesquite v. Aladdin's Castle,* 455 U.S. 283, 289 (1982).[15]

As the court of appeals acknowledged, "the State has attempted repeatedly to alter the contours of [the Illinois Abortion Law] to reflect the latest judicial pronouncements

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[15] It should be noted that the amendment to § 6(1) followed a favorable decision in the district court. Thus, it can hardly be claimed that the State was attempting to avoid an unfavorable ruling by the courts.

in the area of abortion and privacy." J.S. at App. 20. Far from indicating malice, such actions indicate only a good faith attempt by the legislature to conform its laws to the holdings of this Court.[16] The General Assembly, in the context of abortion regulation, has never repealed a challenged provision and subsequently re-enacted that same provision at a later date. Thus, *Mesquite* is inapplicable. In *Mesquite*, the city had a history of repealing its laws and later reenacting them. 455 U.S. at 289. In addition, it openly acknowledged that it intended to re-enact the challenged provision in that case. *Id.* at 289 n.11.

Furthermore, the General Assembly clearly has no intention to re-enact unamended §§ 6(1) and 6(4) since the amendments to those sections were made, in large part, because of the addition of new § 6(2) providing for a second physician to be present during post-viable abortions. *See* App. at 6a. The language of that new section tracks the language of the Missouri statute that was upheld in *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 479 n.3 (1983). The language of unamended §§6(1) and 6(4) is inconsistent with § 6(2). It is ludicrous to suggest, as appellees do, that the State of Illinois would perform the arduous task of enacting a provision over gubernatorial veto with the intent of later re-enacting its prior provisions.[17] Common sense requires that such a scenario be rejected.

Moreover, appellees have offered no evidence that would support such a conclusion. Thus, there is no reasonable expectation that the State will reenact unamended §§6(1) or 6(4).

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[16] H.B. 1399 was enacted after this Court's holdings in *Akron* and *Ashcroft* in 1983.

[17] Unlike the municipal ordinance in *Mesquite*, a state statute is far more difficult to enact. This is especially so in the sensitive area of abortion where, as here, a 3/5 majority vote was necessary to override the gubernatorial veto of H.B. 1399.

Finally, since appellees' challenge to these sections was purely facial, amendment of those provisions necessarily has cured whatever "chilling" effect the unamended provisions may have had upon appellees.[18] *See Allee*, 416 U.S. at 818.

This Court, in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), recently held that, in order to meet the case or controversy requirement of Article III of the U.S. Constitution,

> [t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real' and 'immediate,' not 'conjectural' or 'hypothetical.'

Lyons, 461 U.S. at 101-102 (citations omitted).

There has been no showing, indeed appellees cannot show, that unamended §§ 6(1) and 6(4) have a continued "chilling effect" on their ability, presently or in the future, to perform late term abortions. Late term abortions performed now or in the future are governed by the amended provisions.

No person has ever been prosecuted under prior § 6(1) and no prosecutions are now pending. Nor is there evidence that any abortions were performed on a viable fetus during the time when that section was enforceable in a manner inconsistent with its dictates. The purely theoretical possibility of prosecutions for violations of § 6(1) in its prior form which might have occurred during the few months that that provision was enforceable, is not sufficient to establish a case or controversy. Thus, the court of appeals erred in addressing unamended §§ 6(1) and 6(4).

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[18] Whatever "chilling effect" the unamended provisions may have had on abortions performed during the months when those provisions were in effect, they do not now have a chilling effect since they are no longer on the statute books.

III. THE UNAMENDED VERSION OF SECTION 6(1) IS CONSTITUTIONAL BECAUSE IT IS REASONABLY DRAWN TO PRESERVE THE COMPELLING STATE INTEREST IN PROTECTING VIABLE UNBORN LIFE, AND PLACES NO OBSTACLE IN THE PATH OF A WOMAN EXERCISING HER RIGHT TO TERMINATE A PREGNANCY

A. The State Interest in Protecting Fetal Life Subsequent to Viability Is Compelling and Permits Regulation of Methods of Abortion in Order to Enhance the Likelihood of Fetal Survival Where Such Regulations Do Not Increase Any Risk to the Woman

Section 6(1)[19] of the Illinois law presents this issue for resolution: whether, in the exercise of its compelling interest in the life of the viable fetus, the State of Illinois may regulate abortions performed after viability by requiring employment of a standard of care to protect the life of the fetus.[20]

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[19] Unamended § 6(1) states:

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a viable fetus or infant results from such a failure.

Ill.Rev.Stat. ch. 38, ¶ 81-26(1) (1983).

[20] Section 6(1) does not require the employment of any measure to encourage or sustain the life of the fetus "which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother." Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1983).

Such regulation of abortion is constitutional given the compelling state interest in fetal life at viability. "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, or even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade*, 410 U.S. 113, 164-165 (1973); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 482 (1983). Regulation of abortion after viability is valid if it "reasonably furthers the State's compelling interest in protecting the lives of viable fetuses. . . ." *Ashcroft*, 462 U.S. at 486. Furthermore, such legislation "need not accommodate every conceivable contingency." *Id.* at 485 n.7.

In *Ashcroft*, this Court upheld a provision that required the attendance of a second physician during the abortion of a viable fetus. Noting that the second physician will be able to assure that the interest in preserving life is more fully served than the physician performing the abortion alone would be able to do, this Court concluded that the Missouri provision "reasonably furthers the State's compelling interest in protecting the lives of viable fetuses." *Id.* at 486.

The provisions at issue here, prescribing a standard of care toward viable fetuses, are no more burdensome than Missouri's second-physician requirement. The Missouri second-physician provision requires that certain measures be taken to preserve the life of any child which survives an abortion performed after viability. Section 6(1) requires that fetal protection measures be taken during the course of the abortion performed after viability. In both instances, the State is regulating when it has a compelling interest to do so and in a manner that does not impermissibly burden the woman.

Furthermore, two courts of appeals, *including* the Seventh Circuit, have upheld provisions similar to § 6(1).

In *Planned Parenthood v. Ashcroft*, 655 F.2d 848, 863-864 (8th Cir. 1981) *aff'd in part and rev'd in part on other grounds*, 462 U.S. 476 (1983), the Eighth Circuit found no constitutional

infirmity in Missouri's requirement of the use of "fetal survival methods" of abortion after viability. 655 F.2d at 863.

> This is clearly within the State's power, as long as it does not interfere with medical judgment as to the method necessary for the preservation of the life or health of the mother. . . . Thus, the Missouri statute is clearly constitutional in requiring use of a fetal survival method when the risks of that method to the woman are lower than alternatives. The only remaining question is whether the State can constitutionally require the use of the fetal survival method where the risk is equal. By definition, if the risk is absolutely equal, the life and health of the mother are subjected to no greater risk by requiring use of the fetal survival method. By requiring use of the fetal survival method when the risks from it are less than or equal to the risk of alternatives, Missouri is within permissible bounds of regulation.

655 F.2d at 863 (citations and footnotes omitted). In addition, the Seventh Circuit *previously* upheld a standard of care virtually identical to the one at issue here. *Wynn v. Scott*, 449 F.Supp. 1302, 1321 (N.D.Ill. 1978) (three-judge court), *aff'd sub nom., Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979). Thus, state regulation of the manner of performing an abortion after viability is a valid exercise of the state interest in protecting fetal life.

B. The Court of Appeals Erred in Holding § 6(1) to Be Unconstitutional on Grounds of Vagueness and Chilling Effect

The court of appeals "[did] not hold that the State may never prescribe standards of care to physicians, or their assistants, who perform abortions on a fetus which has attained viability." J.S. at App. 28. Nevertheless, the court held the unamended version of § 6(1) unconstitutional. The court found § 6(1) to be vague for two reasons: 1) it failed to "specify that the attending physician's viability determina-

tion alone shall govern," J.S. at App. 28 and 2) it "imprecisely informs physicians and their assistants as to what conduct by them the State prohibits." J.S. at App. 31. The court then held that the vagueness of § 6(1) threatened to chill the exercise of the physician's best medical judgment and thereby chill the exercise of the woman's fundamental right to consult her doctor about abortion and to receive her doctor's unimpeded medical judgment.

In reaching these conclusions, the court of appeals misapplied basic constitutional doctrines pertaining to vagueness. As a three-judge federal panel wrote in upholding a prior version of § 6(1), "[a] statute is not unconstitutional because someone does not understand it." *Wynn v. Scott*, 449 F.Supp. at 1316. To be void for vagueness, "[a] criminal statute [must] 'fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' or [be] so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'" *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (citations omitted). No such danger is presented by § 6(1).

1. Under § 6(1), the Viability Determination of the Physician Performing the Abortion Is Determinative

Despite plain statutory language that only *intentional* failure to provide the requisite standard of care on a fetus *known* to be viable is subject to prosecution, the court of appeals speculated that the term "known to be viable" may not be limited to the knowledge of the physician who is performing the abortion. "Section 6(1) does not specify . . . which party, physician or assistant, must make this viability determination. . . . In addition, the section could make criminal a physician's failure to observe the required standard of care in situations where some other physician, but not the treating physician, believes that the fetus is viable." J.S. at App. 26.

Other provisions in the Illinois Abortion Law reveal that this construction is untenable. Section 2(2), as amended in 1983, defines "viability" as follows:[21]

> [T]hat stage of fetal development when, *in the medical judgment of the attending physician based on the particular facts of the case before him,* there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

Ill.Rev.Stat., ch. 38, ¶ 81-22(2) (1983) (emphasis supplied).

In light of § 2(2), the only reasonable construction of the phrase "known to be viable" is that it refers to a determination by the attending physician that the fetus is capable of sustained survival outside of the womb.

Prosecution of the attending physician under § 6(1) would require that he or she made the judgment of viability before the abortion was performed but nevertheless intentionally failed to comply with the standard of care requirements of § 6(1). Prosecution of one assisting the attending physician would require that he or she knew that the attending physician had made a determination of viability before the abortion was performed, and that he or she nevertheless intentionally failed to comply with the standard of care requirements of § 6(1). The only determination of viability that has any application under § 6(1) is the determination made by the attending physician prior to the performance of the abortion. A good faith judgment of nonviability will not be second-guessed by the State. *Cf. Ashcroft*, 655 F.2d at 863-864. However, if a physician has made a judgment that the fetus is viable, the State may prohibit the use of an "abortion method [which] is not necessary for the life or health of the woman." *Id.* at 864.

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[21] The preamble to the definitions in Section 2 of the Abortion Law states that "[u]nless the language or context *clearly indicates* a different meaning is intended, the following words or phrases for the purpose of this Law shall be given the meaning ascribed to them." (Emphasis supplied).

In its opinion the court of appeals stated that a determination of viability by "others," meaning non-physicians "who assist physicians in the performance of abortions on a viable fetus," J.S. at App. 25, may bring § 6(1) into operation. The court then reasoned that § 6(1) is unconstitutional because it "could make criminal an *assistant's* failure to use the requisite standard of care *in aborting a fetus* which the assistant *but not the physician* believes is nonviable." J.S. at App. 26 (emphasis supplied). This holding demonstrates the confusion in the analysis of the court of appeals. First, only a physician can legally perform an abortion in Illinois. Ill.Rev.Stat. ch. 38, ¶ 81-23.1 (1983); *see also Connecticut v. Menillo*, 423 U.S. 9 (1975). Second, as previously established, only a physician in the exercise of his medical judgment can make a determination of viability. Ill.Rev.Stat. ch. 38, ¶ 81-22(2). To construe § 6(1) otherwise is to ignore explicit language in the remainder of the Illinois law, and to defy common sense.

As this Court held in *Ashcroft*, "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." 462 U.S. at 493. In this case, the court of appeals did precisely the opposite. The Court ignored a controlling statutory provision, and then proceeded to give a twisted reading to a straightforward criminal provision, which provision requires both prior knowledge and specific intent before criminal liability could attach. The court thus plainly erred in holding that § 6(1) does not specify that the determination of viability of the attending physician shall govern its operation.

2. The Standard of Care Required by § 6(1) Is Not Vague.

The court also erred in holding that § 6(1) fails to give adequate notice of the conduct that it requires of physicians and their assistants. The standard of care imposed by § 6(1) is not difficult to understand or apply. Physicians apply the standard of care applicable to their particular specialty and geographical location day in and day out in their practice.

In *United States v. Vuitch*, 402 U.S. 62 (1971), this Court rejected a vagueness challenge to a statute which prohibited abortions except where necessary to preserve maternal life or health. Ruling that the term "health" did not render the statute unconstitutionally vague, this Court stated "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *Id.* at 72. Thus, a regulation of abortion is not void, as the court of appeals suggests, because it fails to state the "precise" responsibilities of physicians. J.S. at App. 31. It is permissible for States to set forth a general standard of care and require physicians to exercise their medical judgment in deciding how best to abide by that standard.

Indeed, a three-judge panel upheld an earlier version of the Illinois law, prescribing a nearly identical standard of care, as follows:

> [The statute] does not require that the physician increase the risk to the woman in order to save the fetus. If, however, there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure which is least likely to kill the fetus.

Wynn v. Scott, 449 F.Supp. at 1321.

Section 6(1), as it must, leaves the choice of procedures and measures to be taken in any particular case to the medical judgment of the attending physician. It penalizes only an *intentional* failure, to make use of available measures to preserve fetal life or health, provided such measures would pose no increased risk to maternal life or health.[22]

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[22] In striking § 6(1) on grounds of vagueness, the court of appeals adopted a standard of review that is far more hostile to state regulation of abortion after viability than any which has been adopted by this Court:

> In addition, the State must *precisely* tailor its standards of care to the particular State interest at stake so that its statute *precisely* notifies physicians and their assistants as

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3. Since § 6(1) Is Not Vague and the State Interest in Protecting Fetal Life After Viability Is Compelling, § 6(1) Has No Impermissible "Chilling Effect" Upon Any Constitutional Right.

Finally, the court of appeals erred in holding that § 6(1) has a chilling effect upon the right to abortion because it "abuts upon" the exercise of this right and prevents the woman's access to the physician's advice and unimpeded medical judgment. This holding is wrong on several counts. First, § 6(1), standing alone, places no obstacle in the path of a woman seeking an abortion. She is free to consult with her physician and obtain an abortion based on his best medical judgment. It merely regulates the manner in which the physician may perform a post-viable abortion. Thus, § 6(1) does not unconstitutionally "chill" the procurement of an abortion.

Second, any impact which § 6(1) has upon the consultation between a woman and her physician is plainly justified by the compelling state interest in the life of the viable fetus she is carrying. To say that this section "abuts upon" the ability to obtain an abortion is to ignore the fact that the State is empowered by its compelling interest in the fetus to prohibit abortion altogether after viability, except where necessary in medical judgment to preserve maternal life or health. *Roe*, 410 U.S. at 164-165. Clearly, if the State can

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> to what conduct by them the State purports to condemn. Section 6(1) fails to give physicians and their assistants such *explicit* notice.

J.S. at App. 29 (emphasis supplied). In *Ashcroft*, this Court indicated that a statute which operates after viability is constitutional if it "reasonably furthers the State's compelling interest." 462 U.S. at 486. Satisfaction of the standard proposed by the court of appeals would effectively require the State to legislate the parameters of medical judgment, contrary to the opinions of this Court which require deference to the physician's medical judgment and the standards of accepted medical practice. *Akron*, 462 U.S. at 431.

prohibit such abortions, it may take the less restrictive measure of restricting harmful activity directed at the fetus during the course of those abortions that are performed after viability.

Third, the bare existence of a criminal penalty does not produce an impermissible chilling effect. Many forms of regulation of abortion impose some form of criminal liability. This fact, in and of itself, does not constitute an unconstitutional burden on the right to abortion. *Menillo*, 423 U.S. at 10 (1975). Indeed, to suggest that a regulation of abortion impermissibly "chills" the exercise of a constitutional right merely because criminal sanctions attach if it is violated would obliterate the ability of the State to regulate on behalf of maternal health and fetal life and require that most of this Court's prior abortion decisions be overruled. Accordingly, the court of appeals was in error when it invalidated § 6(1) on grounds of vagueness.

IV. SINCE UNAMENDED SECTION 6(4) PLACES NO BURDEN UPON A WOMAN SEEKING TO OBTAIN AN ABORTION AND IS SUPPORTED BY A COMPELLING OR, AT LEAST, VERY SUBSTANTIAL STATE INTEREST IN THE PROTECTION OF FETAL LIFE, IT IS CONSTITUTIONAL

The State has a legitimate interest in protecting fetal life throughout pregnancy which grows in substantiality as the pregnancy advances. *Roe v. Wade*, 410 U.S. 113, 163-164 (1973). The State of Illinois has sought to further its interest in fetal life by regulating the method by which an abortion may be performed in order to maximize the chances of fetal survival. To this end, § 6(4)[23] requires that the method of

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[23] Unamended §6(4) states:

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life or health of the fetus which such person would be required to exercise in

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abortion most likely to preserve the life and health of the fetus be used when, in the physician's judgment, there is a possibility of fetal survival. Section 6(4) does not apply when the fetal survival method of abortion would increase risk to the mother. Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1983), App. at 4a. Thus, the State has sought to further its interest in protecting the fetus without infringing upon the woman's right to terminate her pregnancy in any way.

The court of appeals invalidated § 6(4) for two reasons: 1) it places a burden on the woman's right to abortion by placing the possibility of criminal sanctions against her physician, and 2) it applies to certain previability abortions, and is not supported by a compelling state interest. The court of appeals erred on both counts.

A. Section 6(4) Does Not Burden the Woman's Right to Terminate Pregnancy

Section 6(4) regulates abortion when there is a *possibility* known to the physician performing the abortion of sustained survival of the fetus apart from the body of the mother with or without artificial support. In such situations, the physician and those assisting him must employ the same degree of professional skill, care and diligence to preserve the life and health of the fetus to be aborted as they would be

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> order to preserve the life and health of any fetus intended to be born and not aborted when there exists in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him a possibility known to him of sustained survival of the fetus apart from the body of the mother with or without artificial support. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus before or after birth is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure.

Ill.Rev.Stat. ch. 38, ¶81-26(4) (1983).

required to exercise toward a fetus intended to be born and not aborted. This standard of care has been construed to mean that the physician must choose the method of abortion most likely to cause fetal survival. *See Wynn v. Scott,* 449 F.Supp. 1302, 1321 (N.D.Ill. 1978), *aff'd sub nom. Wynn v. Carey,* 599 F.2d 193 (7th Cir. 1979).

Section 6(4) does not, therefore, restrict in any way the ability of a woman to obtain an abortion. It merely regulates the manner in which a physician may perform an abortion once he knows that there is a possibility of sustained survival for the fetus without increasing risk to the mother.

The various methods of abortion cause greater or lesser complications for the fetus. Dilatation and evacuation, which entails dismemberment of the fetus, ensures fetal death. *Planned Parenthood v. Ashcroft,* 462 U.S. 476, 483 n.7 (1983). A fetus may, however, survive a saline or prostaglandin abortion and the medical literature shows that prostaglandin abortions have a greater incidence of live birth. *See, e.g.*, Stroh & Hinman, *Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience In Upstate New York,* 126 Am.J.Obstet. & Gynecol. 83 (1976). Moreover, in order to prevent the "complication" of live birth following abortion, new technologies have been developed which are designed solely to ensure the death of the fetus. For example, toxic compounds such as urea are administered prior to the performance of an instillation abortion to ensure fetal death and avoid live birth.[24] This is in spite of the fact that such drugs may increase risk to the mother's physical health.[25]

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[24] *See, e.g.*, Haning & Peckham, *Evaluation of Intra-amniotic Adminstration of 120 gm of Urea with 5 mg of Prostaglandin F2 alpha for Midtrimester Termination of Pregnancy between 20 and 24 Weeks' Gestation,* 151 Am.J.Obstet. & Gynecol. 92 (1985); Grimes, *Second-Trimester Abortions in the United States,* 16 Family Planning Perspectives 260, 265 (1984).

[25] *See, e.g.*, Kajanoja, *Induction of Abortion By Prostaglandins in the Second Trimester of Pregnancy,* 113 Acta Obstet.Gynecol.

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Section 6(4) is intended only to restrict such hostile activity toward the fetus. In no circumstances is § 6(4) an obstacle to the decision of whether or not to terminate the pregnancy. The woman remains free to consult with her physician and decide to terminate her pregnancy for whatever reason she and her physician decide upon. She also remains free to effectuate the decision by legally terminating her pregnancy. Section 6(4) only restricts the manner in which the termination of pregnancy—emptying of the womb—can take place since it requires that the physician exercise his medical judgment with the same degree of professional skill, care and diligence to preserve the life or health of the fetus where this can be done without increasing *any risk* to the woman.

Despite these facts, the court of appeals held that § 6(4) imposes a burden upon a woman seeking an abortion because there is a "possibility that the woman will be unable to exercise her privacy right because her doctor refuses to perform an abortion at the risk of inducing criminal sanction." J.S. at App. 34. This analysis avoids the question that is crucial to a sound constitutional analysis of § 6(4). That question is whether the woman has a constitutional right to terminate her pregnancy in a manner that ensures fetal death when other methods that will not increase risk to her and will offer a greater chance of fetal survival are available. If she does not have such a right, then she has no constitutionally protected right to *obtain* an abortion by a method that will ensure fetal death. Her inability to obtain such an abortion could not be said to violate any constitutional right.

To hold otherwise would be contrary to common sense and the holdings of this Court. For example, under the court of appeals' analysis, it would be impermissible for a State to require that all abortions be performed by a physician since the refusal of doctors, in certain areas of the country, to

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Scandinavica Supp. 145, 148 (1983) (simultaneous injection of PGF2 alpha and urea causes more frequent side effects than when PGF2 alpha is given alone).

perform any abortions would limit the woman's access to abortion and would place an unconstitutional burden on the woman's right to terminate her pregnancy.

Such analysis was explicitly rejected by the Court in *Connecticut v. Menillo*, 423 U.S. 9, 10 (1975). In *Menillo*, the Court first determined that a woman does not have a constitutional right to obtain an abortion in an unsafe manner. Since she has no constitutional right to obtain an abortion by a nonphysician, the Court held that a state statute requiring that all abortions be performed by physicians did not violate the woman's right to terminate her pregnancy. *Id.*

The abortional right, as recognized by this Court, is a right to decide whether or not to terminate pregnancy (to expel the fetus from the womb) and to safely effectuate the decision. *Roe*, 410 U.S. at 153, *Menillo*, 423 U.S. at 10 (1975).

The right does not include a right to actively seek to kill the fetus when there is a possibility that the fetus is capable of sustained survival outside the womb. No court has ever held that the right secured in *Roe* is so expansive. In fact, such a notion has been specifically rejected. In *Wynn v. Scott*, the court noted:

> If [ ] there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure which is least likely to kill the fetus. This choice would not interfere with the woman's right to terminate her pregnancy. *It never could be argued that she has a constitutionally protected right to kill the fetus. She does not.*

Wynn v. Scott, 449 F.Supp. at 1321 (emphasis added). Since a woman does not have a constitutional right to terminate a pregnancy in a manner that will ensure fetal death, a state statute requiring that the method of abortion used be one that is safer for an unborn child, does not violate the woman's right to terminate her pregnancy.

Moreover, sound constitutional adjudication requires close attention to what consequences flow from "state action" and what consequences flow from unrelated private decisions and conduct. *Maher v. Roe*, 432 U.S. 464, 474 (1977). The former may be conceived as "burdens" on the right to abort, while the latter lack constitutional significance. *Harris v. McRae*, 448 U.S. 297, 315 (1980). Particularly close attention to this distinction is warranted in the present context since appellees claim that the private refusal of doctors to provide abortions when a statute such as §6(4) is in place imposes an unconstitutional burden on a women's right to terminate her pregnancy by limiting her access to abortions.

The requirements of §6(4) neither coerce nor significantly encourage any physician to refuse to perform abortions by the method most likely to result in fetal survival. Thus, the private decisions of some physicians to refuse to perform all abortions when there is a reasonable possibility of fetal survival, simply because they are unable to perform them by a method that would ensure fetal death, cannot be attributed to the State.

For the foregoing reasons, § 6(4) does not burden a woman's right to obtain a safe, legal abortion. Thus, the court of appeals erred in holding that § 6(4) does create such a burden.

B. The State Interest in Protecting Fetal Life Is Compelling, or at Least Very Substantial, Whenever There Is a Possibility of Sustained Survival of the Fetus Outside of the Womb

1. The State's Interest in the Fetus Is Compelling When the Fetus Is Potentially Able to Survive Outside the Womb

This Court has consistently held that the State has a compelling interest in protecting the lives of unborn children who are capable of sustained survival outside of the womb. In *Roe*, the Court held that the State's interest in the fetus becomes compelling when the fetus is "potentially able to

live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. *See also Planned Parenthood v. Danforth*, 428 U.S. 52, 63 (1976). That holding was reaffirmed in *Colautti v. Franklin*, 439 U.S. 379, 393 n.11 (1979).[26]

Section 6(4) does not prohibit abortions. It merely protects fetuses who have the potential to live outside the womb from gratuitous hostile activity during the course of an abortion that is unrelated to the process of "emptying the womb." Illinois has legitimately chosen to enforce this provision at the earliest point in pregnancy at which this Court has recognized a compelling state interest in fetal life. The *Roe* definition of viability clearly encompasses situations where the physician knows, based on the facts of the case before him, that there is a possibility of sustained survival.[27]

Since § 6(4) applies only when there is a possibility that the fetus can survive, under *Roe* it operates at a time when the State's interest is compelling.

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[26] In *Colautti*, this Court eschewed the contention that the earlier definitions of viability set forth in *Roe* and *Danforth* had been rejected:

> [T]here is no merit in the dissenting opinion's suggestion [] that the Court has "tacitly disown[ed]" the definition of viability as set forth in *Roe* and *Planned Parenthood*. On the contrary, as noted above [] we *reaffirm* what was said in those decisions about this critical concept.

439 U.S. at 393 n.11 (emphasis in original).

[27] "Potential" is defined as "existing in possibility" in *Webster's New Collegiate Dictionary* 660 (1956), and as "possible" in *The American Heritage Dictionary of the English Language* 1025 (1975). Thus in common usage, "potentially able to live" as used in *Roe* means the same thing as "possibly able to live."

2. Even if the State Interest in Protecting Fetal Life When There Is a Possibility of Sustained Survival of the Fetus Is Not Deemed Compelling, It Is Nevertheless Very Substantial and, Therefore, Sufficient to Uphold a Regulation, Such as § 6(4), That Imposes No Burden Upon a Woman's Right to an Abortion.

The court of appeals held that § 6(4) regulates "the abortion of a fetus which is potentially viable," J.S. at App. 32-33, and thus, regulates "the performance of abortions at a stage prior to viability." *Id.* at 33. Holding that the interest in protecting fetal life becomes compelling only at viability, and that the State's interest was not compelling here, the court struck § 6(4). The implication of the court's holding is that the State's interest in the fetus is non-existent prior to "viability" and suddenly becomes compelling at that point. That analysis, however, is seriously flawed. The state interest in protecting fetal life grows in substantiality during the course of pregnancy and becomes compelling at the point of viability. *Roe*, 410 U.S. at 164-165. Assuming, *arguendo*, that the state interest concerning § 6(4) is not compelling, it is certainly very substantial whenever there is a possibility of sustained survival for the fetus outside of the womb. *Id.*

Section 6(4) does not burden the woman's decision to abort. It merely requires that the physician give attention to the life and health of any fetus which he thinks has a possibility of surviving. The State does not question the physician's good faith judgment, but it does require that, in light of this judgment, the physician account for the possibility of sustained fetal survival.

This exercise of the State's important interest in protecting fetal life is particularly appropriate because of the advances in neonatal medicine that have brought the point at which a fetus is potentially able to survive outside the womb within the second trimester of pregnancy. *See* Charts of premature infant survivability, App. at 8a-9a. An examination of these charts shows the actual complexity of the medical judgment of viability. In the more recent studies 50% of the fetuses of gestational age of 24 weeks survived. By 26 weeks survival increased to 67% and by 30 weeks to 95%. The possibility of

sustained survival is directly related to advancing gestational age and to birthweight. The more advanced gestational age, the greater the probability of survival.

Under this Court's decisions the State has a compelling interest in protecting any individual fetus for whom the physician has made the determination that sustained survival is possible. It is presumed that the physician's medical judgment is not made in a vacuum but will be based on medical studies which show some possibility of survival in the class in which a particular fetus falls. The fact that *some* members of that class will not survive does not mean that, by providing protection for an *individual* fetus, one has sought to assert a compelling interest *prior* to viability. Those fetuses who survive and who fall in the earliest gestational stages for which modern medical technology can bring about sustained survival, must have been viable. Consequently, § 6(4) applies only to viable fetuses.

Given the substantiality of the state interest in protecting fetal life when there is a possibility of sustained survival and the lack of burden imposed upon the woman, § 6(4) is constitutional. The court of appeals erred in striking it and that holding should be reversed.

V. THE AMENDED VERSION OF SECTION 6(1) IS CONSTITUTIONAL

The amended version of § 6(1) requires that a physician use the method of abortion which is most likely to preserve the life and health of the fetus when he has determined that there is a reasonable likelihood of sustained survival of the fetus outside the womb.[28]

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[28] The full text of Section 6(1) as amended reads as follows:

> (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his

(footnote continued on next page)

Thus, it applies only after fetal viability, and the determination of viability is left exclusively to the attending physician as required by this Court's precedents. *See Colautti v. Franklin*, 439 U.S. 379, 387 (1979). Amended §6(1) also specifies the required conduct—use of a method of abortion—that must be met. Furthermore, § 6(1) requires no "trade-off" in maternal life and health in favor of the state interest in fetal life.[29] Section 6(5) of the Illinois law as amended by H.B. 1399 limits the application of § 6(1) as follows:

> Nothing in Section 6 requires a physician to employ a method of abortion which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother.

Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1984 Supp.).

Accordingly, § 6(1) as amended fulfills all criteria of constitutionality for regulation of abortion after viability. The court of appeals refused to hold that a State may never regulate the method of abortion after viability. J.S. at App. 28. Its holding was based on vagueness. In fact, the court of appeals stated affirmatively that the State "may regulate

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(footnote continued from preceding page)

> medical judgment most likely to preserve the life and health of the fetus.
>
> (b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.
>
> (c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(1)(a) commits a Class 3 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-26(1) (1984 Supp.).

[29] The question of whether the State may legitimately require some degree of trade-off of maternal health in the interest of protecting fetal life or health is an open question, and not one presented in this case. *Cf. Planned Parenthood v. Ashcroft*, 655 F.2d 848, 863 n.24.

abortions at or after the stage of viability even if the State's regulations interfere with a woman's fundamental right to choose abortion." J.S. at App. 27 (footnote omitted).

The governing legal principles for amended § 6(1) are set forth in part III A of this brief. Thus, for the reasons set forth there, amended § 6(1) is constitutional.

VI. THE AMENDED VERSION OF SECTION 6(4) IS CONSTITUTIONAL

As set forth in Part II of this brief, a live case or controversy remains with respect to § 6(4) as amended. The court of appeals should have reviewed § 6(4) as it stood amended, but did not. The court's holding, however, is clearly controlling over both the amended and unamended versions of § 6(4). Since the court ruled upon unamended § 6(4), major treatment of the legal issues raised concerning § 6(4) has been set forth in Part IV of this brief dealing with the unamended provision. Because the issues remain the same regardless of which version is reviewed, those arguments apply with equal force to amended § 6(4).[30] Thus, for the reasons set forth in Part IV, amended § 6(4) is also constitutional.

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[30] The amended version of § 6(4) reads as follows:

> (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.
>
> (b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.
>
> (c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(4)(a) commits a Class 3 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-26(4) (1984 Supp.).

CONCLUSION

The judgment and order of the court of appeals, insofar as they entered a permanent injunction against Sections 2(10) and 11(d), must be reversed. The judgment and order of the court of appeals insofar as they entered a permanent injunction against the unamended versions of Sections 6(1) and 6(4) must be reversed and remanded with directions to vacate the judgment and dismiss the cause as moot. If this Court should reach the merits of unamended Sections 6(1) and 6(4), the judgment of the court of appeals entering a permanent injunction against these sections must be reversed. If having reversed the judgment of the court of appeals on mootness, this Court should reach the merits of the amended versions of Sections 6(1) and 6(4), these provisions are constitutional and must be upheld.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION

U.S. Const. amend. XIV, § 1 (in pertinent part):

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ADDITIONAL STATUTORY PROVISIONS PRIOR TO AMENDMENT BY H.B. 1399 ON JUNE 30, 1984

§ 1. It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of

the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling state interest in the infant and unborn child, to assure the integrity of marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed.

Ill.Rev.Stat. ch. 38, ¶ 81-21 (1983).

"Viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

Ill.Rev.Stat. ch. 38, ¶ 81-22(2) (1983).

"Abortion" means the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death.

Ill.Rev.Stat. ch. 38, ¶ 81-22(6) (1983).

"Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the vitelline membrane of the ovum.

Ill.Rev.Stat. ch. 38, ¶ 81-22(7) (1983).

"Fetus" and "unborn child" each mean a human being from fertilization until birth.

Ill.Rev.Stat. ch. 38, ¶ 81-22(9) (1983).

"Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

Ill.Rev.Stat. ch. 38, ¶ 81-22(10) (1983).

No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable on a form prescribed by the Department under Section 10 of this Law.

Ill.Rev.Stat. ch. 38, ¶ 81-25(1) (1983).

No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure.

Ill.Rev.Stat. ch. 38, ¶ 81-26(1) (1983).

No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus

which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure.

Ill.Rev.Stat. ch. 38, ¶ 81-26(4) (1983).

Nothing in Section 6 requires a physician or any other person to employ any measures to encourage or sustain the life of the fetus during the course of a pregnancy termination which, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, would increase medical risk to the mother.

Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1983).

Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

Ill.Rev.Stat. ch. 38, ¶ 81-31(d) (1983).

ADDITIONAL STATUTORY PROVISIONS SUBSEQUENT TO AMENDMENT BY H.B. 1399 ON JUNE 30, 1984

"Abortion" means the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

Ill.Rev.Stat. ch. 38, ¶ 81-22(4) (1984 Supp.).

"Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum.

Ill.Rev.Stat. ch. 38, ¶ 81-22(5) (1984 Supp.).

"Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth.

Ill.Rev.Stat. ch. 38, ¶ 81-22(6) (1984 Supp.).

When the fetus is viable no abortion shall be performed unless in the medical judgment of the attending or referring physician, based on the particular facts of the case before him, it is necessary to preserve the life or health of the mother. Intentional, knowing, or reckless failure to conform to the requirements of subsection (1) of Section 5 is a Class 2 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-25(1) (1984 Supp.).

(a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or

without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act,[1] the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section (6)(1)(a) commits a Class 3 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-26(1) (1984 Supp.).

(a) No abortion shall be performed or induced when the fetus is viable unless there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for any child born alive as a result of the abortion. This requirement shall not apply when, in the medical judgment of the physician performing or inducing the abortion based on the particular facts of the case before him, there exists a medical emergency; in such a case, the physician shall describe the basis of this judgment on the form prescribed by Section 10 of this Act. Any physician who intentionally performs or induces such an abortion and who intentionally, knowingly, or recklessly fails to arrange for the attendance of such a second physician in violation of Section 6(2)(a) commits a Class 3 felony.

(b) Subsequent to the abortion, if a child is born alive, the physician required by Section 6(2)(a) to be in attendance shall exercise the same degree of professional skill, care and diligence to preserve the life and health of the child as would be required of a physician providing immediate medical care to a child born alive in the course of a pregnancy termination

which was not an abortion. Any such physician who intentionally, knowingly, or recklessly violates Section 6(2)(b) commits a Class 3 felony.

Ill. Rev. Stat. ch. 38, ¶ 81-26(2) (1984 Supp.).

(a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(4)(a) commits a Class 3 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-26(4) (1984 Supp.).

Nothing in Section 6 requires a physician to employ a method of abortion which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother.

Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1984 Supp.).

NEONATAL SURVIVAL RATE (%) BY BIRTH WEIGHT

Study #	Years of Study	# of Infants[e]	Jurisdiction	Birth Weight (Hundreds of Grams)																	
				<5	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
1[c]	1975-1976	187	Colo.		0	28	37	37	68	68	68	75	94	98						
2[c]	1976-1978	467	Ohio			20		56			73			87						
3[c]	1976-1979	894	Vt./N.H.	0		23		43			80			86			94		98	
4[b]	1974-1980	1,048	Colo.	0		27		55			79			89				95		
5[a]	1975-1980	60	Cal.			40 (> 50 since 1978)			82 (> 90 since 1979)											
6[b]	1980	56	N.C.				24			67										
7[c]	1979-1981	2,061[f]	Ala.	0	5	25	42	66	74	81	82	80	93	97	97	94	98	100	97	
8[a]	1980-1982	185	Wis.			16		53	52	70		84			98					
9[a]	1982-1983[d]	697[g]	Ala.			23		55	50	71										

[a] survival = infants discharged from hospital.

[b] survival = alive at 28 days.

[c] survival not clearly defined.

[d] study covered 10-year span; only most recent years included here since relevant survival rates were readily excisable.

[e] unless otherwise noted, represents only those infants weighing less than 2000 grams (the upper parameter in this chart); a particular study may include a greater number of infants.

[f] reflects total number of infants from entire study since exact number of infants weighing less than 2000 grams not ascertainable.

[g] reflects total number of infants from entire study since exact number of infants studied during 1982-83 not ascertainable.

NEONATAL SURVIVAL RATE (%) BY GESTATIONAL AGE

Study #	Years of Study	# of Infants[d]	Juris-diction	Gestational Age (Weeks[f]) 22	24	26	28	30	32	34	36
3[c]	1976-1979	1,156	Vt./N.H.	0	11	36 47 62	73 76	92	92 98	98 96	
4[b]	1974-1980	2,803	Colo.	0	11	55	84		93		99
10[a]	1977-1980	136	Mass.	28	10	44 60 92					
11[a]	1977-1980	62	N.Y.	36	38	61 76					
7[c]	1979-1981	2,061[e]	Ala.	17	9 18	29 53	57 67	86 92	91 99	94 97	99 100
8[a]	1980-1982	185	Wis.	0	37	37 68	85 82	81 91	100	100 100	100 100
12[b]	1982	619	U.K.	0	16	39 56 58					
13[c]	1979-1984	105	Tex.	0	50	28 67	100 88	100	95		

[a]survival = infants discharged from hospital.

[b]survival = alive at 28 days.

[c]survival not clearly defined.

[d]unless otherwise noted, represents only those infants of less than 37 weeks gestational age (the upper parameter in this chart); a particular study may include a greater number of infants.

[e]reflects total number of infants from entire study since exact number of infants less than 37 weeks gestational age not ascertainable.

[f]some studies estimated gestational age based on the last completed week and others on the nearest completed week; particular method of estimation utilized in each study not always ascertainable.

Source: Americans United for Life, Chicago

References:

1. Bowes et al., *Results of the Intensive Perinatal Management of Very-Low-Birth-Weight Infants (501 to 1,500 Grams)*, 23 J.Reprod.Med. 245 (1979).

2. Hack et al., *The Low-Birth-Weight Infant: Evolution of a Changing Outlook*, 301 New Eng.J.Med. 1162 (1979).

3. Philip et al., *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 Pediatrics 122 (1981).

4. Koops et al., *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update*, 101 J.Pediatrics 969 (1982).

5. Hirata et al., *Survival and Outcome of Infants 501 to 750 gm: A Six-Year Experience*, 102 J.Pediatrics 741 (1983).

6. Kraybill et al., *Infants with Birth Weights Less Than 1,001 g: Survival, Growth, and Development*, Am.J. Diseases Children 837 (1984).

7. Goldenberg et al., *Survival of Infants with Low Birth Weight and Early Gestational Age, 1979 to 1981*, 149 Am.J. Obstet.Gynecol. 508 (1984).

8. Worthington et al., *Factors Influencing Survival and Morbidity with Very Low Birth Weight Delivery*, 62 Obstet.Gynecol. 550 (1983).

9. Goldenberg et al., *Neonatal Mortality in Infants Born Weighing 501 to 1,000 Grams*, 151 Am.J.Obstet.Gynecol. 608 (1985).

10. Herschel et al., *Survival of Infants Born at 24 to 28 Weeks' Gestation*, 60 Obstet.Gynecol. 154 (1982).

11. Dillon & Egan, *Aggressive Obstetric Management in Late Second-Trimester Deliveries*, 58 Obstet.Gynecol. 685 (1981).

12. Milner & Beard, *Limit of Fetal Viability*, 1:8385 Lancet 1079 (1984).

13. Gilstrap et al., *Survival and Short-Term Morbidity of the Premature Neonate*, 65 Obstet.Gynecol. 37 (1985).